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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

TO: The Commission

REPLY COMMENTS OF PRESS COMMUNICATIONS, LLC

1. Press Communications, LLC ("Press") hereby submits its Reply Comments in response to the Notice of Proposed Rule Making ("NPRM"), FCC 97-397, released November 26, 1997 in the above-captioned proceeding.

2. This proceeding involves proposals to shift from a comparative hearing process to an auction process in order to resolve mutually exclusive application situations. As the Commission correctly notes, the authorizing legislation which set this proceeding in motion -- the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997) -- by its own terms distinguishes between applications which were filed prior to July 1, 1997 and those which were filed on or after that date.

3. A number of commenters have urged the Commission not to

re-open filing windows which were closed prior to July 1, 1997. See, e.g., Comments of Six Video Broadcast Licensees; Comments of Dakota Communications, et al. Press supports that position with one important caveat. Press is aware of a number of applications for new television construction permits which were filed prior to July 1, 1997, but which were not accepted and "cut-off" prior to that date. That is, these applications have not been the subject of any "A Cut-Off" list, and the deadline for filing competing applications has not yet been established or announced. Press submits that, in such cases, the Commission must still permit the filing of competing applications at some future date to be designated by the Commission (most likely through the issuance of an "A Cut-Off" list).

4. Press's understanding in this regard derives from the following language from the Conference Report accompanying the Balanced Budget Act:

> The conferees recognize that there are instances where a single application for a radio or television station has been filed with the Commission, but that no competing applications have been filed because the Commission has yet to open a filing window. In these instances, the conferees expect that, regardless of whether the application was filed before, on or after July 1, 1997, the Commission will provide an opportunity for competing applications to be filed.

Conference Report at 573-74, quoted in the NPRM at 12, ¶24 (emphasis added). The Conferees used the term "open a filing window", which appears to refer to the window filing process utilized with respect to applications for, e.g., new FM construction permits. Applications for new television

construction permits are still governed by the Commission's well-established "cut-off" process. Nevertheless, both the "window" and the "cut-off" process serve the identical goal of providing potential applicants with clear notice of the deadline by which a competing application must be filed in order to be considered mutually exclusive. Accordingly, Press understands that the Conferees intended by their quoted language to insure that, where no cut-off list relative to new television applications had been issued prior to July 1, 1997, such a list will have to be issued, and competing applications invited, before any non-cut-off pre-July 1, 1997 application could be granted.

5. At Paragraph 25 of the NPRM, the Commission seems to suggest that post-June 30, 1997 applications may be subject to dismissal if more than one application happens to have been filed for a given channel before July 1, 1997, irrespective of whether the opportunity for filing such applications had formally closed by July 1, 1997. This interpretation appears to be based on an overly and improperly narrow reading of unfortunately imprecise legislative history.

6. The Conference Report distinguishes between two classes of applications -- those filed before July 1, 1997, and those filed on or after that date. As the language quoted above demonstrates, the Conference Report clearly contemplates that, for applications for which the Commission "has yet to open a filing window", additional post-June 30, 1997 applications can and should be accepted and disposed of by auction, that is, that

"the Commission will provide an opportunity for competing applications to be filed."

7. There is only one way that the quoted language can be interpreted. That is, where a filing opportunity (e.g., FM filing window, TV "A Cut-Off" list) had opened and closed prior to July 1, 1997, then the universe of applicants eligible to compete for that particular channel is closed to any additional applicants, even though other applicants who might not have been inclined to file under a comparative hearing system might have been willing to file under an auction system. In effect, Congress appears to have correctly recognized that fundamental fairness (and, to the extent that Congress sought to encourage settlements of such cases, practical necessity) required that, if the door to new applicants had already been closed to new applicants prior to July 1, 1997, it would be inappropriate to reopen it thereafter. Such a result would certainly be consistent with the reasonable and legitimate expectations of the applicants who had filed before that date.

8. But by the same token, Congress appears also to have understood that, in some situations, the door to competing applications may not have been closed prior to July 1, 1997. And in such situations, Congress has clearly indicated that the door should remain open.

9. The Commission derives its excessively narrow tentative interpretation from the Conference Report. See NPRM at 12, ¶¶24-25. But the Conference Report itself is not necessarily a model

of correctness and precision. For example, the Conference Report states that auctions are mandatory with respect to a certain class of applications, when in fact the statute clearly makes auctions discretionary. Obviously, the Conference Report cannot be deemed to be a carefully and reliably written work.

10. In Press's view, the only legitimate interpretation of the Conference Report language and the statutory language is the following. Where the opportunity to file for a given channel had been made fully available to all potentially interested applicants prior to July 1, 1997, then the universe of applicants eligible to compete for that channel is closed to any post-June 30, 1997 applicants. But where the opportunity to file had not been foreclosed prior to July 1, 1997, then that opportunity must be deemed to remain open. Thus, for example, where a filing window for an FM channel opened prior to July 1, 1997 but closed after, all applicants filing within the designated window can and should be deemed eligible. Similarly, where a television application was filed prior to July 1, 1997, but was not put on an "A Cut-Off" list until after that date, then applicants filing in response to that cut-off list can and should be deemed eligible. [1/]

[1/] The Conference Report seems to reflect some misunderstanding by Congress of the Commission's processes. For instance, it refers to the "open[ing of] a filing window" for radio and television applications, even though, as noted above, "filing windows" are technically limited to FM applications, as opposed to TV or AM applications. Presumably, Congress used the term "filing window" to connote an opportunity, formally announced by the Commission, to file for a channel (in any

(continued...)

11. Such an interpretation is consistent with the goal of preserving the reasonable and legitimate expectations not only of the applicants who filed before July 1, 1997, but also of those who filed after. It would make no sense, for example, for Congress to have provided that new applications could be filed for a channel applications for which were cut-off years ago. And it would similarly make no sense for Congress to have sought to bar some, but not all, applications filed after July 1, 1997 when the Commission's own rules and procedures plainly contemplated the acceptance of such applications.

12. Moreover, the Commission's tentative interpretation would lead to plainly irrational consequences. For example, let us assume that two television channels were available for filing pre-July 1, 1997. On June 28, 1997, two applications were filed for one of the channels (but not accepted or cut-off), but only one application was filed for the other (similarly not accepted or cut-off). The Commission's tentative interpretation would mean that post-June 30, 1997 applications could be filed for the latter channel, but not for the former channel. That makes no sense: since no potential applicant had any reason to believe that the opportunity to file was going to be foreclosed by the happenstance of more than one applicant filing prior to July 1, 1997, the distinction tentatively drawn by the Commission

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[1/](...continued)
service) by a date certain, with a failure to file by that date resulting in the loss of any further opportunity to file for it. For television applications, such an opportunity would be presented by the issuance of an "A Cut-Off" list.

provides an unexpected windfall to those who did file (by foreclosing additional competing applications) and penalizes those who reasonably expected the Commission's processes to operate normally. [2/]

13. Read as a whole, the statute and the Conference Report indicate that Congress saw no reason to reopen previously closed proceedings to new applicants, but that, by the same token, it saw no reason to treat previously opened proceedings as closed. Basically, Congress was attempting to accommodate the reasonable and legitimate expectations of all concerned. The Commission's tentative interpretation, or misinterpretation, would defeat that statutory goal. Accordingly, Press submits that that interpretation is plainly incorrect and should be rejected. [3/]

14. A number of commenters have also urged that auctions not be used to resolve mutual exclusivity of FM translator applications. See, e.g., Comments of the National Translator

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[2/] Additionally, Press envisions a further hypothetical situation involving two applications filed before July 1, 1997, neither subject to any cut-off or window limitation, and neither even accepted for filing prior to July 1, 1997. Assume further that those applicants reach a settlement pursuant to which one of the two dismisses its application. That would leave only the surviving applicant, which would still have to go through acceptance and cut-off processes. In other words, because of the settlement, the situation would have reverted to the "single application" situation which would leave open the opportunity for further applications.

[3/] Press also notes that, from a purely pecuniary point of view, it would appear to advance Congress's purpose to include post-June 30, 1997 applications in those situations where the filing opportunity had not closed prior to July 1, 1997. Such situations should be subject to auction, and the more potential bidders, the greater the return for the government.

Association;. Press concurs with those comments. Unlike television translators, which are subject to low power television rules and which, therefore, may originate programming and operate commercially, the permissible operations of FM translators are extremely limited. Forcing FM translator applicants through an auction process would likely discourage new FM translator applications. That, in turn, could lead to reduction (or at least less than maximum utilization) of the FM translator service, which would be inconsistent with the statutory goal of maximally efficient use of the spectrum.

15. That unfortunate result would be doubly unfortunate because it is unnecessary. To the best of Press's knowledge, the Commission has historically been able generally to avoid the need for any comparative process in the FM translator service. While full service broadcast services have been subject to comparative hearings, and the LPTV service has been subject to lotteries, the Commission has thus far been able to process hundreds if not thousands of FM translator applications without the apparent need for any elaborate comparative process. Because of this, Press urges the Commission not to force mutually exclusive FM translator applicants to participate in an auction. Instead, the Commission and the applicants should cooperate to resolve the mutual exclusivity to the benefit of the applicants and the public. Should the Commission experience any significant increase in mutually exclusive FM translator applications which cannot be resolved by other means, the Commission may at that

time consider whether the circumstances warrant implementation of auctions for such cases. But as matters now stand, Press does not believe that any such need exists.

16. Finally, Press joins other commenters (e.g., the National Association of Broadcasters) in urging the Commission not to utilize auctions with respect to applications for modifications of facilities. When a licensee attempts to improve its facilities, it is acting not only in its own best interest, but also in the best interest of the public, consistently with the mandate of the Communications Act. Far from imposing a potentially expensive burden on such licensee-applicants, the Commission should encourage the filing of facilities improvement applications. To the extremely limited extent that such applications might result in some mutual exclusivity -- and Press hastens to point out that the number of such instances has historically been minuscule -- the Commission can and should be prepared to resolve such situations on an ad hoc basis without forcing the applicants into an adversarial bidding posture.

Respectfully submitted,

/s/ Harry F. Cole
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